85-1251

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

V.

DANNY E. HILL, 47TH DISTRICT ATTORNEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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21 January 1986

QUESTIONS PRESENTED

1. Whether the Fifth Circuit's failure to recognize the Attorney General of Texas as the exclusive representative of the state's interest in federal litigation regarding the constitutionality of a Texas penal statute violates federal law and fundamental notions of comity by denying the state's right to control its participation in the federal judicial process.

2. Whether the Fifth Circuit's failure to recognize the Attorney General of Texas as the exclusive representative of the state's interest in litigation denies Texas law which designates the Attorney General as such a representative.

3. Whether the Fifth Circuit's granting of a motion to intervene which had not been acted upon by the district court and, which was filed by an unnamed class member who also improperly created the appeal was erroneous and misconstrued the proper role of appellate courts in the federal judiciary.

PARTIES TO THE PROCEEDING BELOW

The Plaintiff-Appellee below is Donald F. Baker.

The Defendant-Appellant below is Danny E. Hill, 47th District Attorney.

The Defendant-Intervenor below is the State of Texas.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 26, 1985.

REFERENCE TO OPINIONS

The opinion of the United States District Court for the Northern District of Texas, Dallas Division is reported at 553 F.Supp. 1121 (1982) and is reproduced as Appendix B in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The final judgment of the United States District Court for the Northern District of Texas, Dallas Division is unreported. A copy of this judgment is included as Appendix C in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The opinion supplementing the original opinion of the United States District Court for the Northern District of Texas, Dallas Division is reported at 106 F.R.D. 526 (1985) and is reproduced

as Appendix D in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The original panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at 743 F.2d 236 (1984) and is reproduced as Appendix E in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The opinion of the United States Court of Appeals for the Fifth Circuit on rehearing *en banc* is reported at 769 F.2d 289 (1985) and is reproduced as Appendix A in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The opinion of the United States Court of Appeals for the Fifth Circuit on petition for rehearing *en banc* is reported at 774 F.2d 1285 (1985) and is reproduced as Appendix F in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit *en banc* was entered on August 26, 1985. A timely petition for rehearing was denied on October 23, 1985, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

United States Code, Title 28:

§ 2403. Intervention by United States or a State; constitutional question.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law,

have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Supreme Court Rule 28. Filing and service--special rule for service where constitutionality of Act of Congress or state statute is in issue.

.4(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. § 2403(b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U.S.C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. § 2403(b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

Federal Rule of Civil Procedure 23. Class Actions.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate order:

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into action.

Federal Rule of Civil Procedure 24. Intervention.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he

is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

Plaintiff Donald Baker filed suit on November 19, 1979 seeking a declaratory judgment that Texas Penal Code Ann. § 21.06 (Vernon 1974) (Homosexual Conduct) was unconstitutional. Thus, jurisdiction was properly based on 28 U.S.C. §§ 1331, 1343, 2201 and 2202. Plaintiff named Henry Wade, in his official capacity as Dallas County District Attorney, and Lee Holt, in his official capacity as Dallas City Attorney, as defendants representing a class of all district and city attorneys in the State of Texas.

Shortly after suit was filed, Defendant Holt filed a request for certification pursuant to 28 U.S.C. § 2403(b), requesting that the Attorney General of Texas be allowed to intervene to represent the state's interest. On June 3, 1980, the district court certified the case to the Attorney General and granted him leave to intervene.

The Attorney General appeared to defend the constitutionality of § 21.06 of the Texas Penal Code on July 9, 1980. After a trial on the merits, the district court declared § 21.06 unconstitutional on its face and enjoined defendants from enforcing it. Respondent Danny Hill, District Attorney of Potter County, was neither a named defendant nor a class representative.

Defendants Wade and Muncy, substituted for Defendant Holt, declined to appeal the decision of the district court. Danny Hill filed a notice of appeal on October 28, 1982. At that time, no named party had sought to appeal. The Attorney General of Texas filed a notice of appeal on behalf of the State of Texas on November 1, 1982. After reviewing the record which was then prepared, the Attorney General determined that the interests of the state would be best served by dismissing the appeal. The state's appeal was dismissed on March 18, 1983. On March 28, 1983, Hill tried unsuccessfully to have the Texas Supreme Court mandamus the Attorney General to pursue an appeal to the Fifth Circuit.

Hill on April 12, 1983, filed a motion to intervene and to be named class representative under Rules 23 and 24 of the Federal Rules of Civil Procedure in the district court. While the motion was pending, Hill filed a motion to intervene and be named class representative in the Fifth Circuit. On August 16, 1983, a Fifth Circuit judge granted Hill's motion. Two weeks before oral argument the district court denied Hill's motion.

On September 21, 1984 a panel of the Fifth Circuit held that the Texas Attorney General was presumptively an adequate representative of the state's interest and the Texas Attorney General's respresentation had been adequate in fact, and thus the district attorney was not entitled to interevene as of right to prosecute the appeal. *See Baker v. Wade*, 743 F.2d 236 (5th Cir. 1984).

On August 26, 1985, the Fifth Circuit in an *en banc* decision vacated the panel opinion of September 21, 1984, and held that the order allowing Hill's motion to intervene and be named class representative for purposes of pursuing the appeal was justified. The decision was rendered after the Attorney General of Texas intervened to protect the state's interest. *See Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Opinions And Rules Of This Court, And With Federal Statutory Law.

This Court in its case law and rules, and Congress through statutory enactment, have chosen the states' attorneys general to speak for their respective states in federal litigation when the constitutionality of a state statute is at issue. The people of Texas through their Constitution and statutory enactments have chosen the Texas Attorney General as their chief law officer and entrusted him with the authority to represent and protect their interests in civl litigation. The Fifth Circuit in a nine-to-seven vote has now held that, whenever one of the 1085 district, county, and city attorneys of Texas is dissatisfied with the Attorney General's decision concerning litigation, any one of them may appeal a district court decision "on the *a priori* basis that all others are out of step and that he alone knows the

state's true interest." *Baker v. Wade*, 769 F.2d 289, 298 (5th Cir. 1985) (en banc) (Rubin, J. joined by Goldberg, Politz, Randall, Tate, Johnson, and Williams, J.J., dissenting). The Fifth Circuit's decision obstructs the administration of justice in the federal judiciary and impairs a state's right to control its litigation; it is a gross aberration that cannot be, and is not, the law.

In *New York v. Uplinger*, 104 S.Ct. 2332 (1984), a local district attorney defended the constitutionality of New York's loitering statute. After certiorari was granted, the New York Attorney General filed a brief as *amicus curiae* supporting the position that the statute was unconstitutional. Upon realizing the "fundamental conflict in the positions taken by [the local district attorney] and the New York Attorney General, a circumstance which was 'not manifestly or fully apprehended at the time certiorari was granted,'" the court dismissed the writ as improvidently granted. 104 S.Ct. 2333 n. 1, 2334. *Uplinger* established as a matter of federal law a priority scheme as to whom the federal judiciary will recognize to speak for the collective interests of a state: "[I]n addressing the constitutionality of a statute with state-wide application we consider highly relevant the views of the State's chief law enforcement official." 104 S.Ct. 2333 n.1.

The pronouncement in *Uplinger* is not a recent phenomenon. In fact, the Court has consistently recognized and protected a state's right to designate under its laws a chief legal officer who speaks for it in federal litigation.

In *Marino v. Ragen*, 332 U.S. 561 (1947), the concession by the Attorney General of Illinois that the procedure followed in a criminal trial denied petitioner due process of law led the Court to vacate the judgment and remand to the Circuit Court: "In light of the [Attorney General's] confession of error . . . we conclude that petitioner was denied the dur process of law which the Fourteenth Amendment requires." *Id.* at 562.

In *Little Rock & Ft. S. Ry. v. Worthen*, 120 U.S. 97 (1887), a board of railroad commissioners consisting of the governor, secretary of state and auditor of public accounts of Arkansas acting pursuant to the advice of the Attorney General of Arkansas appraised the property of railroads in contravention

of a state statute. The Court, in finding that the state had not deprived the companies of due process, recognized the importance of the state's attorney general: "When, therefore, under the advice of the attorney general, the board of railroad commissioners treated as invalid the direction of the statute . . . it obeyed the constitution rather than the legislature. . . . Here the conflict between the constitution and the statute was obvious, and the board had the advice of the highest legal officer of the State." *Id.*

Worthen and *Marino* implicitly recognize what *Uplinger* explicitly stated: only one official—a state's chief legal officer—is vested with the authority to represent and protect a state's interests in the federal judiciary.

The prominent position accorded to the states' attorneys general in the federal system is also evidenced by 28 U.S.C. § 2403(b) and Supreme Court Rule 28.4(c). Underlying both these provisions is the strong resumption that the attorney general of a state is the exclusive legal representative of a state's interest before the federal judiciary.

Congress in 28 U.S.C. § 2403(b)[1] provides that "in any action, suit, or proceeding in a court of the United States to which a State . . . is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene."

Supreme Court Rule 28.4(c) augments the scope of section 2403(b) by mandating that notice be given to the Attorney General of a state whenever the "constitutionality of *any statute* of a State is drawn in question." (emphasis added). *See* 13 J. Moore, Moore's Federal Practice ¶ 828.06 (2d ed. 1985).

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1. Congress, in section 2403(b), explicitly sought to give the states control of the appellate process through their attorneys general. *See* S. Rep. No. 204, 94th Cong., 2nd Sess. 9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 1988, 1977.

These two provisions do not require notice or allow intervention by a local district attorney to represent a state in litigation concerning the constitutionality of a state statute. Congress and this Court have recognized the authority of a state's Attorney General to speak for that state as a matter of right whenever the constitutionality of a state statute is at issue. There is no evidence that Congress or this Court intended that local prosecuting attorneys should be vested with the authority to represent a state's interest in matters of statewide concern. *See* Supreme Court Rule 36.4 (the attorney general of a state files an *amicus* brief on behalf of the state whereas a local district attorney only files an *amicus* brief on behalf of the district); *cf.* Supreme Court Rule 28.4(c) (only a state attorney general is notified when the constitutionality of a state statute is involved).

The various decisions by this Court, as well as section 2403(b) and Rule 28.4(c), mandate the recognition of a state's chief law officer as the exclusive spokesperson on behalf of the interests of a state where the constitutionality of a state statute is in question. The Fifth Circuit's failure to entertain, much less consider, the views of the Attorney General of Texas violates this mandate.[2]

The underlying policy reasons for this mandate seek to protect both federal and state interests.

Allowing the *en banc* decision of the Fifth Circuit to stand would result in unmanageable litigation in the federal judiciary. It would allow the many thousands of city, county and district attorneys across the United States to assert as many different positions before this and every federal court. The result of exposing the federal judiciary to such unwarranted litigation is

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2. The Fifth Circuit has ignored its own authority. *See McGee v. Estelle*, 722 F.2d 1206, 1212 & n. 18 (5th Cir. 1983) (en banc) (quoting *Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir. 1983), *cert. denied*, 464 U.S. 988 (1984)) ("the attorney general, as the chief legal officer of the state, is the appropriate person to" waive the requirement that a state prisoner exhaust his state remedies before seeking federal habeas corpus relief); *see also United States v. Texas*, 680 F.2d 356, 368 n. 16 (5th Cir. 1982) (attorney general's power to represent state agencies is exclusive).

the loss of a significant degree of administrative control possessed by this Court over federal litigation. *See McCarthy v. United States*, 394 U.S. 459, 463-65 (1969) (the Court's broad supervisory power over the lower federal courts includes the authority to establish proper construction to be given federal statutory enactments).

The wisdom of allowing a state to speak with a single voice becomes apparent when the interests of the state are examined.

In order to mantain law favorable to the state and to protect itself, Texas speaks with one voice to establish coherent and uniform legal policy. This state policy prevents the many local state attorneys from taking legal positions that are either in their self-interest or that would be detrimental to the state. *See Baker v. Wade*, 743 F.2d at 242-243.

Because it is the State of Texas that has the ultimate financial responsibility to fund any injunctive relief or pay any monetary judgments including attorney's fees under 42 U.S.C. § 1988, *Hutto v. Finney*, 437 U.S. 678, 699-700 (1978), the power to decide when to settle or when to pursue litigation is logically vested in one state-wide elected official, the Attorney General, who has an incentive to balance litigation costs with the objectives of litigation, and who can be held responsible for the balance he strikes:

> If Hill or any of the multitude of prosecuting attorneys may take it on himself to appeal an adverse ruling, the expense would not fall on Hill or on the other Horatius at the constitutional bridge or on his city or county but on the state.

Baker v. Wade, 769 F.2d at 298 (Rubin, J., dissenting).

The people of Texas can easily hold the Attorney General responsible for any litigation decision but they cannot hold a local state attorney accountable for a decision which, although not in the best interests of the entire state, was made with the tacit approval of his or her local constituency.

Under the Constitution of Texas, the Attorney General represents the state and conducts its litigation. In the instant matter, the Attorney General made the determination, after careful consideration of the trial court record and relevant case law, that an appeal would not serve the state's interest. When the people of Texas are dissatisfied, their remedy is the ballot box.

2. Failure To Reverse The Fifth Circuit Will Result In The Disruption Of A Delicate Balance Of Federal And State Relations Established Under The Constitutional System Of Federalism Which Insures The Protection Of State Sovereign Interests.

The federal system of government created by the Constitution established a national government operating in a mutual sphere of influence with state governments that act as independent political communities with the authority to make decisions of self-governance which "include the power to structure and organize the processes of government." La Pierre, *The Political Safeguards of Federalism Redux: Intergovenmental Immunity and the States as Agents of the Nation*, 60 Wash. U.L.Q. 779, 790-92 & nn. 31-33 (1982). *See Lane County v. Oregon*, 7 Wall. 71, 76 (1869).

This Court has specifically identified two incidents of self-governance which belong exclusively to the states. In *Coyle v. Smith*, 221 U.S. 559, 565 (1911), the Court held that a state, by virtue of "necessary attributes as an independent sovereign government" may determine for itself the location of the local seat of government. Similarly, the selection of who controls the civil litigation of a state is solely a matter of state law. *New York v. Uplinger*, 104 S.Ct. at 2333 n. 1.

Under the constitutional system of federalism, incidents of state sovereignty do not exist in a vacuum; without the assistance of this Court, Texas's designation of the Attorney General as its legal spokesperson is meaningless.

In two decisions one hundred and sixteen years apart this Court recognizes that the federal government must protect incidents of state sovereignty.

Chief Justice Chase in *Texas v. White*, 7 Wall. 700 (1869), discussed the effects of the Ordinance of Secession on the existence of Texas as a member of the Union. In concluding that Texas did not cease to be a state, he recognized that the "preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." 7 Wall. at 725. *Texas v. White* is significant for the principle it represents; in sensitive matters of state and federal relations this Court has the authority and the duty to preserve and maintain incidents of state sovereignty.

Incidents of state political sovereignty also receive protection from the states' participation in the Federal Government itself. *Garcia v. San Antonio Metro. Transit Authority*, 105 S.Ct. 1005, 1021 (1985), held that limits on Congressional power under the commerce clause arise from the protection "inherent in all congressional action—the built in restraints that our system provides through state participation in federal governmental action." 105 S.Ct. at 1020. Because the states ultimately control federal legislation, "laws that unduly burden the States will not be promulgated." *Id.* at 1020. Thus, "state sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 105 S.Ct. at 1018.

The states are represented in the judicial branch of the federal government by a designated chief legal officer under state law. Further, the states through congressional action in enacting 28 U.S.C. § 2403(b) have chosen to protect an important sovereign interest—whom they allow to control civil litigation involving the constitutionality of one of their statutes in the federal judiciary—through the legislative branch of the federal government. To allow an illegitimate representative—here a local district attorney—to speak for a state's interests nullifies the protection voiced in *Garcia*.

The Fifth Circuit by allowing Hill to take control of the civil litigation in Texas effectively vetoes section 2403(b), disregards *Garcia*, and tramples upon the sovereign right of Texas to

designate the Attorney General to control the civil litigation of Texas. Only this Court can restore the proper balance of state and federal relations the Ffith Circuit unbalances.

3. The Decision Below Directly Contravenes Texas Law.

The Fifth Circuit by its decision selects Danny Hill, a local district attorney, to control the civil litigation of Texas—a result directly prohibited by Texas law.

The Constitution of Texas designates the Attorney General as the chief law officer of the state responsible for representing the state in civil litigation. Tex. Const. art. IV, § 22, interp. commentary (Vernon 1984).

The Attorney General of Texas is one of six elected statewide constitutional officers. Tex. Const. art. IV, § 1. It is his duty to "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party . . . and perform such other duties as may be required by law." Tex. Const. art. IV, § 22. Legislative enactment further echoes the constitutional provision by requiring the Attorney General to "prosecute and defend all actions in the [State] Supreme Court or the Courts of Civil Appeals in which the State may be interested." Tex. Rev. Civ. Stat. Ann. art. 4395 (Vernon 1976).

In contrast the Texas Constitution gives county and district attorneys only the authority to "represent the State in all cases in the District and inferior courts *in their respective counties [or districts].*" Tex. Const. art. V, § 21. (emphasis added).[3] County and district attorneys also have the exclusive control of criminal prosecutions. *See* Tex. Code Crim. Proc. Ann. arts. 2.01, 2.02 (Vernon Supp. 1985).

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3. The Texas Constitution limits the authority of a district attorney to his or her respective district. Pursuant to Texas legislative mandate "the District Attorney of the 47th Judicial District of Texas [the District represented by respondent Hill] shall only represent the State of Texas in the counties of Potter and Armstrong." Tex. Rev. Civ. Stat. Ann. art. 326k-36a (Vernon Supp. 1985). Both the Texas Constitution and the people of Texas through their legislature have silenced Respondent Hill to speak legally on an issue of state-wide signifcance.

The Texas Constitution thus creates a division of authority between local state attorneys and the Attorney General. The critical distinction lies in the scope of the two offices created: one is purely a local office; the other, a state-wide office. In a very early case the Texas Supreme Court emphasized that the important function of representing the state in cases where the state is a party belongs only to the Attorney General:

> Now let us ask the pointed question: Is it reasonable to suppose that it was the purpose to intrust absolutely the important function of representing the state as an attorney in all cases in which the state should be a party to the numerous county attorneys or to the district attorneys, should the Legislature see fit to create that office for certain districts, elected, as the case might be, in their respective counties or district, or to a general state officer, like the Attorney General, elected by the people of the whole state? To ask the question is to answer it. . . . Again, we cannot lose sight of the fact that the voters, especially in restricted localities, not infrequently are influenced by some improper motive, some sympathy for the candidate or some popular caprice which leads them to put incompetent men into office, a possibility by no means so probable in case of an important office like that of Attorney General in whose election all the voters of the state have the right to participate.

Brady v. Brooks, 89 S.W. 1052, 1056-57 (Tex. 1905).

By virtue of the fact that the Attorney General of the State of Texas is the sole officer authorized by law to protect the collective interests of the state in court, he is clothed with "broad judgment and discretion" and must remain free to exercise this discretion in an independent manner. *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924). This broad discretionary authority extends to decisions made concerning litigation in federal courts.[4]

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4. During the last session of the Texas Legislature, State Representative Bill Ceverha introduced legislation which would have restricted the authority of the Attorney General to enter into an out-of-court settlement or consent judgment on behalf of the state in any litigation pending in a federal court

(footnote continued on following page)

The decision whether to appeal a judgment is by necessity within the ambit of the Attorney General's discretionary authority. In *Bullock v. Texas Skating Ass'n*, 583 S.W.2d 888 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.), the court upheld the authority of the Attorney General to appeal a judgment of a district court against the instructions of another state-wide constitutional officer—the Comptroller of Public Accounts:

> In matters of litigation the Attorney General is the officer authorized by law to protect the interests of the State, and . . . "must exercise judgment and discretion, which will not be controlled by other authorities." It was within the discretion of the Attorney General, not that of the Comptroller, to decide whether to appeal a case in which the State had experienced an adverse judgment in the trial court.
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> 583 S.W.2d at 894 (citations omitted).

> The issue of who speaks for the state in civil litigation—the Attorney General of Texas or a local district attorney—has been implicitly decided by the Texas Supreme Court in the instant

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(continued from previous page)

which would result in a determination that a state statute, rule, practice, or policy is unconstitutional under state or federal law or that a state consitutional provision is unconstitutional under federal law, unless the state agency represented by the Attorney General consented to the settlement or judgment. Tex. H.B. 867, 69th Leg. (1985).

Ceverha's bill was defeated. Thus, Texas law by direct inference grants the Attorney General authority "to enter into an out-of-court settlement of a suit pending before a federal court that would have the effect of . . . declaring a state statute to be unconstitutional under federal law." House Comm. on State Affairs, Bill Analysis, Tex. H.B. 867, 69th Leg. (1985).

case.[5] After the state decided not to appeal the decision of the district court, respondent Hill petitioned the Supreme Court of Texas for a writ of mandamus to compel the Attorney General to appeal. On April 6, 1983, without a written opinion, the Texas Supreme Court denied Hill's motion for leave to file the mandamus. *Hill v. Mattox*, No. C-1973 (Tex. April 6, 1983).

Significantly, in the petition to the Texas Supreme Court, Hill himself acknowledged the Attorney General's stature as the chief legal officer of Texas: "no other state official . . . has the authority to represent the State of Texas." Petition for Writ of Mandamus at 2.

Thus the Fifth Circuit, by allowing Hill to appeal this case, grants a district attorney the authority to represent the State of Texas—a power directly prohibited Hill by Texas law.

4. The Fifth Circuit Decision Allowing Hill To Intervene Fundamentally Misconstrues The Role of Appellate Courts In The Federal Judiciary.

The Fifth Circuit decision allowing Hill to intervene was improper if not dangerous. Incredible as it may seem, the Fifth Circuit has allowed a non-party to create an appeal where he had no right to appeal and then to intervene in that same appeal:

> Determined to uphold the constitutionality of a Texas statute whatever obstacles bar the way, the majority opinion tramples every procedural rule it considers. No party to the suit has pursued this appeal, but the

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5. Because Hill is incapable of prosecuting this appeal under Texas law, the Fifth Circuit's *en banc* decision impermissibly injects itself into the internal affairs of Texas. *See Rizzo v. Goode*, 423 U.S. 362, 379-383 (1976). Under basic principles of comity and federalism this Court should protect the sovereign interests of Texas by not allowing Hill to prosecute the appeal before the Fifth Circuit and in the process nullify the effect of Texas law. *See generally Younger v. Harris*, 401 U.S. 37 (1971); *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895); 17 Wright, Miller & Cooper, Federal Practice and Procedure §§ 4241, 4251 (1978).

> majority opinion recognizes an appeal filed by a class member who was not a class representative at the time he filed his appeal, permits a so-called intervention to be filed in the court of appeals by the same class member who sought to intervene only in his own abortive-appeal. . . .

Baker, 769 F.2d at 293 (Rubin, J., dissenting).

Hill was not a party to the suit and did not have a right to appeal the district court judgment. Mere class membership did not accord Hill full party status. *See* Newberg, *Class Actions*, § 2830 (1977).

Further, Hill lacked standing to appeal on the basis that he was not an aggrieved party. Hill was not personally aggrieved by the judgment declaring the statute unconstitutional. Even assuming, *arguendo*, that the law was capable of enforcement before the judgment was entered, once the statute was declared unconstitutional, Hill no longer was under an official duty to enforce it. Hill has been aggrieved no differently than any other attorney, judge, or local prosecuting attorney in Texas who is bound to follow the laws. Since Hill suffered no "demonstrable, particularized injury" necessary to satisfy Article III standing requirements, Hill cannot prosecute an appeal.[6] *See Zablocki v. Redhail*, 434 U.S. 374, 380 n. 6 (1978).

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6. The standing limitations on the federal judiciary embodied in the "case" and "controversy" requirements of Article III require a court to consider constitutional as well as prudential factors before it exercises judicial power. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Inherent in the prudential element of Article III standing is respect for the operation of the other branches of government: "when transported into an Article III context, [the principle that a government should be given wide latitude in the operation of its own internal affairs], grounded as it is in the idea of separation of powers counsels against recognizing standing in a case brought . . . to seek a restructuring of the apparatus established by the executive branch to fulfill its legal duties." *Allen v. Wright*, 104 S.Ct. 3315, 3330 (1984). *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Thus, standing may be denied on grounds that a suit interferes with the internal operations of an independent governmental entity. Insofar as Hill's participation in this suit restructures the internal organization of Texas government, he should be denied standing to prosecute an appeal.

A motion to intervene filed by a member of a class in an appellate court which had not been acted upon by a district court does not create appellate jurisdiction. "An intervenor by definition does not create a suit on appeal; he intervenes in an action that has already been undertaken." *Baker*, 769 F.2d at 295 (Rubin, J., dissenting). Because Hill could not, and did not have standing to appeal at the time he filed his motion to intervene, there was no appeal, and *a fortiori* intervention was impossible.

In the midst of its confusion the Fifth Circuit cast off all procedural shackles, violated the exclusive fact finding province of the federal district courts and found that intervention was proper under Rule 23(d)(2) and 24(a)(2) of the Federal Rules of Civil Procedure. *See* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791, at 192 (1972) (Rule 23 gives the *trial court* extensive power to control the conduct of class actions).

Even if consideration of Hill's motion to intervene was properly before the Fifth Circuit, Hill did not meet the requirements of Rule 24(a) for intervention.

Rule 24(a)(2) requires that the applicant for intervention establish all of the following four elements before intervention as of right is granted: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit. *New Orleans Public Service, Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc).

Hill filed a notice of appeal; nine months later he filed a motion to intervene in that same appeal. A motion to intervene filed in an appellate court in an existing appeal by a non-party who was aware of the action in the district court is not timely. *See McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962); *see also Baker*, 769 F.2d at 296 (Rubin, J., dissenting); *cf. United Airlines Inc. v. McDonald*, 432 U.S. 385, 390 (1977) (class member must timely assert his right to intervene in trial court).

The interest to be protected must be "direct, substantial,[7] and legally protectable." *New Orleans Public Service, Inc.*, 732 F.2d at 463. Hill did not have this kind of interest: he did not face expulsion from office if he complied with the district court judgment; he faced no monetary costs either in his personal or official capacities; he never showed that he ever enforced the law or was going to enforce it. Hill had no legally recognizable interest; Hill was not entitled to intervene simply because he would have ruled differently had he been the judge. *See Pate v. Dade County School Board*, 588 F.2d 501, 503 (5th Cir. 1985).

The Attorney General defended the interests of the state—the real party in interest—in the district court. Hill's only ground of inadequate representation is the class representatives' failure to appeal. Failure to appeal is only a factor in deciding whether representation has been adequate. *See Baker*, 769 F.2d at 297 (Rubin, J. dissenting). The core test for adequate representation, which Hill cannot meet, is whether the applicant for intervention can show "adversity of interest, collusion, or nonfeasance." *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984).

Intervention was improperly granted since none of the four requirements is met.

The Fifth Circuit's sponsorship of Hill's appeal deviates so substantially from accepted federal procedure that this ground alone justifies the granting of certiorari to review the judgment below.

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7. Hill's interest was neither direct or substantial. Hill's true interest was as an intervenor on behalf of an organization known as Dallas Doctors Against Aids (DDAA):

> Hill has not shown that he is the real party in interest in this case. Indeed, he has not participated in it in any way—and is being represented by a Dallas attorney, Wm. Charles Bundren, who was an incorporator and an attorney for DDAA. Under these circumstances, there should be at lease a minimal showing that it is Potter County or the Potter County District Attorney—and not DDAA or its attorneys—that is prosecuting these motions (and the attempt to retry this case).

Baker v. Wade, 106 F.R.D. 526 (N.D. Tex. 1985) (citations to footnotes omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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